May 7, 2013

Ms. Carole Leigh Hutton
President and CEO
United Way Silicon Valley
Sobrato Center for Nonprofits - San Jose
1400 Parkmoor Avenue, Suite 250
San Jose, CA 95126

Re: Your Request for Advice
Our File No. A-13-042

Dear Ms. Hutton:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").[1] The Commission provides advice as to prospective activities, but not with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place.

QUESTION

Under the facts presented, is United Way Silicon Valley required to disclose its donors pursuant to the Act if a ballot measure campaign uses United Way Silicon Valley's nonprofit bulk mail permit to receive a reduced postage rate for campaign-related mail.

CONCLUSION

Yes, United Way Silicon Valley does have to disclose its donors pursuant to Regulations 18215 and 18412 if it makes nonmonetary contributions to a local ballot measure committee where the organization's non-donor funds from the sale of a building are used up and it does not have other organizational income.

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

United Way Silicon Valley has a nonprofit bulk mail permit that it has lent to ballot measure campaigns to help defray the cost of mailing campaign-related material. United Way Silicon Valley has not traditionally paid for the cost of such mass mailings, but merely the annual fee for maintaining the nonprofit bulk permit out of the organization's general operating funds. Recipient committees have borne the cost of mass mailings.

United Way Silicon Valley is a 501(c)(3) nonprofit organization that works to improve lives by mobilizing the caring power of the community to meet local health and human service needs. To do this, United Way Silicon Valley employs five enabling strategies to improve community conditions: programmatic work, strategic grants to local nonprofits, advocacy, partnerships and volunteerism.

United Way Silicon Valley's fiscal year runs July 1-June 30. Most of its revenue is derived from contributions from donors in the community. However, over ten percent of the organization's unrestricted revenue is derived from two distinct sources (a) "investment income" derived from investment of its revenues into various investment vehicles and (b) "miscellaneous income" derived from fees for service and rent from a building owned by United Way Silicon Valley. United Way Silicon Valley sold the building it owns at the end of 2012. It thus had a large source of non-donor funds.

In fiscal year 2011-2012, unrestricted revenue from "investment income" totaled $26,651 and the "miscellaneous income" totaled $742,410 for a combined total of $769,061. Less than four years ago, in 2010, United Way Silicon Valley made a $154,226 nonmonetary contribution to the Measure A campaign in Santa Clara County and filed a Form 461 as a county major donor report, pursuant to the Act's disclosure rules. In 2012, United Way Silicon Valley made a $15,092 nonmonetary contribution to the Measure D campaign in San Jose and filed a Form 461 as a city major donor report, pursuant to the Act's disclosure rules. The organization charged its nonmonetary contribution against "miscellaneous income" and thus was not required to disclose its donors.

Since that time, and at no other time, United Way Silicon Valley has not received any funds earmarked for political purposes. United Way Silicon Valley obtained a nonprofit bulk mail permit in 2010 and has renewed the permit annually using general operating funds which is funded primarily through a combination of unrestricted revenue, donations and grants (both restricted and unrestricted dollars).

United Way Silicon Valley is not and has never registered as a recipient committee. United Way Silicon Valley has always acted as a "major donor" (in-kind). United Way Silicon Valley had a large source of non-donor income from the sale of the building in 2012, but that income has been or is being used up so United Way asks how to report donors if it makes nonmonetary contributions to ballot measures in the future.

ANALYSIS

A committee's use of an organization's bulk rate permit is a nonmonetary contribution from the organization. (See "bulk rate permits" in Campaign Manual 3 (2007), page 3-8.) When United Way Silicon Valley gives the use of its bulk rate permit to a ballot measure committee for a mailing, the use of the permit constitutes a nonmonetary contribution from United Way Silicon Valley to the ballot measure committee. Accordingly, the use of the permit must be reported as a contribution from United Way Silicon Valley to the ballot measure committee.

In this case, where United Way Silicon Valley is lending its nonprofit organization bulk mail permit, you must report as a contribution (1) the difference between the standard bulk mail postage rate and the nonprofit bulk mail postage rate, plus the cost of the nonprofit bulk mail permit; or (2) the difference between the nonprofit rate and the first class rate. (*Roudebush* Advice Letter, No. A-96-071.) For large mailings, the former will, of course, result in a smaller reportable contribution.

You are asking about how to report donors now because United Way Silicon Valley used to have a large source of non-donor funds from the sale of a building at the end of 2012. In making political contributions from the income United Way Silicon Valley received from the sale of the building, rather than donor funds, United Way Silicon Valley was not required to identify donors. In the *Pirayou* Advice Letter, No. A-12-135, we advised United Way Silicon Valley that if it made contributions from non-donor revenues such as the building sale, investment income or fees for service, it would not be required to itemize donors, but should report its contributions on a major donor report.

Under the Act, a nonprofit organization making contributions or expenditures in California elections is required to disclose donors to the organization who knew or had reason to know that their funds might be used for political purposes. (Regulations 18215(b)(1) and 18412.)

Regulation 18215(b) provides in part:

> "(b) The term 'contribution' includes:
> (1) Certain Payments to Nonprofit Organizations and Federal or Out-of-State Political Organizations Active in California Elections. Any payment made to a person or organization other than a candidate or committee, when, at the time of making the payment, the donor knows or has reason to know that the payment, or funds with which the payment will be commingled, will be used to make contributions or expenditures. . . .
> There shall be a presumption that the donor does not have reason to know that all or a part of the payment will be used to make expenditures or contributions, unless the person or organization has made expenditures or contributions of at least $1,000 in the aggregate during the calendar year in which the payment occurs, or any of the immediately preceding four calendar years. A donor to such

a person or organization shall be identified and reported as provided in Regulation 18412."

Regulation 18412 states that the nonprofit organization must disclose donors equal to the total amount of funds it used for the political contribution or expenditure. Donors are disclosed in the following order until the amount of the expenditure is reached:

(1) The nonprofit organization must first disclose donors to the organization who request or know that their payment will be used to make a contribution or independent expenditure.
(2) Next the organization must identify additional donors who are presumed under Regulation 18215(b)(1) to have had "reason to know" that all or part of their payments would be used to make contributions or expenditures, using a "last in, first out" accounting method.
(3) If donors listed above are not sufficient to account for the full amount of the contribution or independent expenditure, the organization allocates the remaining balance of the contribution or independent expenditure to itself.

If an organization is not using donor funds to make its political contributions or expenditures, but is using revenue from income-producing activities of the organization, Regulation 18412(e)(3) provides:

> "(3) An organization that makes expenditures from income-producing revenues (such as sales of goods or services or investment income) shall file reports as a committee pursuant to Section 82013(b) or (c) [as an independent expenditure or major donor committee]."

Although United Way Silicon Valley had been making contributions from funds derived from the sale of a building, if those funds are used up and other organizational income does not cover it, United Way Silicon Valley will have to itemize donations that comprise the sources of funds that it spends on California ballot measures in the future. If you need assistance with reporting you may reach political reform consultants by email at advice@fppc.ca.gov or by phone at (866) 275-3372.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,
Zackery P. Morazzini
General Counsel

By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl